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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1406

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Petitioners file this reply brief pursuant to Rule 24(4) of the Rules of this Court in support of their petition and in response to respondents' brief in opposition to the petition.

A. THE CASE

This action challenges the redistricting by the defendants of the five supervisors' districts of Adams County, Mississippi, from which members of the county governing board are elected. The original complaint alleged that the redistricting plan adopted by the de-

fendants was invalid (1) for failure to obtain proper clearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), (2) because the redistricting plan was racially discriminatory in violation of rights secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1971(a) (1) and 1973, and (3) because the resulting districts failed to meet the one man, one vote requirements of the decisions of this Court, and thus violated rights secured by the Equal Protection Clause of the Fourteenth Amendment.

As to Count 2, plaintiffs requested by way of relief, inter alia, a declaratory judgment that the challenged redistricting plan (approved on November 2, 1970) was racially discriminatory (which would have had the effect of barring its use as the basis for future plans) and injunctive relief against the defendants enjoining them from future racial gerrymandering in redistricting the supervisors' districts of the county. The district court rejected plaintiffs' claims under Counts 1 and 2, but sustained plaintiffs' claims under Count 3 and ordered the defendants to file with the court a new redistricting plan by December 1, 1971 (App. 1a-51a).[1] Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit from the denial of relief under Count 2, defendants appealed from the granting of relief under Count 3, and the court of appeals affirmed the decision of the district court on both counts, and ordered new supervisors elections after a new redistricting plan had been approved by the district court (App. 52a-63a).

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[1]The abbreviation "App." refers to pages in the Appendix filed with the Petition.

Plaintiffs then filed with this Court a petition for a writ of certiorari to review the judgment of the court of appeals sustaining the denial of relief under Court 2, that is, sustaining the refusal of the district court to declare that the defendants' November 2, 1970 redistricting plan was racially discriminatory, to enjoin the defendants from future racial gerrymandering in redistricting, or to order new elections for other officials elected on the basis of supervisors' districts, viz., justices of the peace and constables, on the basis of districts which are not discriminatory or gerrymandered.

Defendants, respondents here, have filed a brief opposing the petition not on the merits, but on the grounds that the issues raised in the complaint are moot, that the petition is premature, and that the granting of the petition would result in piecemeal adjudication of issues which are no longer primary or decisive. They rest their contentions on acts and events occurring subsequent to the decision of the court of appeals but required by the decision of the district court and the court of appeals. Thus, they point out that pursuant to the decision of the district court as affirmed by the court of appeals, defendants filed before December 1, 1971, their revised redistricting plan apportioning the population among the five supervisors' districts of Adams County on a more equal basis, that a hearing has been held on the new plan (and on an alternative plan presented by the plaintiffs), and that the district court has approved defendants' revised redistricting plan and has ordered a special election for new county supervisors on November 7.

B. MOOTNESS

This action clearly is not moot. First, the district court in its Judgment of July 27, 1971, which plaintiffs appealed to the court of appeals, specifically retained jurisdiction of the action for purposes of a hearing on the new plan ordered by the court "and for other necessary relief" (App. 51a). If the case is subject to dismissal because of mootness, the usual practice of this Court "with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). If that occurred, this would require the decisions of the court of appeals (affirming the action of the district court and ordering new elections) and the district court to be vacated and the action dismissed. This would either require the defendants to revert back to their prior redistricting plan which was held to violate equal protection guarantees (since they enacted their new plan pursuant to the direction of the district court) or would allow the new plan to stand but without the requirement of new supervisors elections to cure the unconstitutionality of elections held on the basis of malapportioned districts (ordered by the court of appeals). Where substantial questions are presented, neither the enactment of a new apportionment plan nor even the holding of new elections render the underlying cause of action, or the questions presented, moot. *Whitcomb* v. *Chavis*, 403 U.S. 124, 140-41 (1971); *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463 (1968).

Second, the criminal cases which have come before this Court clearly state the principle that a cause is not moot if the decision from which review is sought continues to have collateral and adverse legal consequences. *Sibron* v. *New York*, 392 U.S. 40 (1968). This is particularly true where the decision below has the effect of *res judicata* in subsequent cases or, as here, in the same case. See *United States* v. *Munsingwear, Inc.*, supra.

After the decision of the court of appeals, the defendants filed with the district court, not a new redistricting plan, but merely a revision of the previous plan adjusting the boundary lines to more nearly equalize the population of the five supervisors' districts. Having filed a revised plan based on the plan which was upheld by the court of appeals (and of which review is sought in this Court), the defendants then argued in the district court that because of the decision of the court of appeals the plaintiffs were foreclosed from challenging the new plan either on the methodology used or on grounds of racial gerrymandering: "Defendants urge that their plan must be accepted by [the district court] for the reasons that it clearly and undisputably complies with the directives of the Court of Appeals and is founded upon a method or procedure which specifically has the approval of the Court of Appeals." Memorandum Brief of Defendants, p. 2.

The plan presented by the defendants, as before, split Census enumeration districts and abandoned historic district boundary lines, combined portions of heavily black Natchez with portions of the heavily white rural

area outside Natchez in each new district, provided for only one black majority district of the five new districts in a county which is 47.9 percent black, and provided for new districts unequal in population with a population span of 214 persons and a percentage span of 2.86 percentage points of variance. The new district boundary lines in the county outside of Natchez remained unchanged, except for the boundary line between Districts One and Two (see Petition, p. 15, county map). Also as before the boundaries of defendants' proposed districts within the City of Natchez were not compact and the location of the new lines show an intentional dilution of the voting strength of the black population concentration in the northern part of the city formerly included within old District Four (see Petition, p. 13, Figure 1):

Figure 1. Map showing the boundaries of the new supervisors' districts (beats) within the City of Natchez as established by the defendants' 1971 redistricting plan approved by the district court in its Opinion of May 15, 1972, superimposed on 1970 Census enumeration districts shaded for racial percentage (compare with map in Petition, p. 14, Figure 2). The "Z" marks indicate instances in which the new boundaries split up 1970 Census enumeration districts.

On the other hand, plaintiffs presented to the district court an alternative redistricting plan which generally corresponded to the theory expressed at the first hearing — that it was possible to carve two new districts out of old District Four without dispersing or diluting the concentration of black population residing in that district (Petition, pp. 8, 9). Plaintiffs' proposed alternative redistricting plan did not split any Census enumeration districts and retained the historic and previously exsting district boundary lines to the extent possible, did not divide the black population concentration in the northern part of the City of Natchez among all five districts (as did defendants' plan), provided for two black majority districts, provided districts which were compact and composed of contiguous territory, and surpassed the defendants' plan in providing equality of population among the five districts by providing for a population of span of only 134 persons, and by providing five districts all of which had less than 1 percentage point of variance and a total span of 1.79 percentage points.

Plaintiffs challenged defendants' plan on grounds of racial gerrymandering and malapportionment, but the district court, considering itself bound by the decision of the court of appeals now up for review, specifically approved and endorsed the 'defendants' plan and ordered it into effect. In particular, the district court expressed the view that it was foreclosed from examining defendants' new plan for any evidence of racial gerrymandering because of the instant decision of the court of appeals: "The Appellate Court likewise put to rest plaintiffs' contention that the configuration of the supervisory districts, extending spoke-like out

from the City of Natchez was an intent to gerrymander." Opinion of May 15, 1972, p. 8.

Because the decision of the court of appeals from which petitioners seek leave to appeal by way of certiorari was interpreted by the district court to have controlling legal effect and adverse legal consequences upon petitioners' contentions in subsequent proceedings in this case, the issues presented are not moot.

Third, a case is not moot if the "defendant is free to return to his old ways" and "there exists some cognizable danger of recurrent violation" of the law. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953). If this Court finds that the court of appeals was in error, and that defendants' November 2, 1970 redistricting plan did include the salient characteristics of a racial gerrymander (Petition, pp. 23, 24), then plaintiffs should be entitled to future relief, as prayed for in the complaint, for a declaratory judgment disapproving the old plan on racial grounds, for an injunction against future gerrymandering, and for new elections for all district officers. Mere voluntary cessation of illegal conduct, or as plaintiffs contend here, subsequent illegal conduct which conforms to the past discrimination, does not render moot a suit for declaratory and injunctive relief if it is possible for the defendant to resume (or continue) such unlawful conduct. *United States* v. *W. T. Grant Co.*, supra.

C. PREMATURITY AND PIECEMEAL ADJUDICATION

This Court frequently has held that it is not a sufficient jurisdictional objection to a petition for a writ of certiorari that "the appeal is premature and constitutes a piecemeal adjudication," Brief of Respondents, p. 1, since the contention that the decision below lacks finality is no bar to the exercise of this Court's jurisdiction to review cases from the courts of appeals. As long as a timely petition for certiorari is filed, this Court has jurisdiction to take the case whatever its status in the lower courts. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 145, 153 (1964); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *The Conqueror*, 166 U.S. 110, 113 (1897); *American Construction Co.* v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372 (1893); see R. Stern and E. Gressman, SUPREME COURT PRACTICE 26-27 (4th ed. 1969). The jurisdictional statute invoked here, 28 U.S.C. § 1254(1) (and not 28 U.S.C. § 1291 erroneously relied upon by the respondents, Brief for Respondents, p. 6), allows review of any "cases in the courts of appeals . . . before or after rendition of judgment or decree," and there is no jurisdictional requirement of finality of adjudication.

Assuming that considerations of finality enter into the discretionary decision whether or not to grant certiorari, and petitioners have no doubt that they do, Stern and Gressman, supra, 180, this Petition is not premature and the issuance of the writ would not constitute piecemeal adjudication of the case for essentially the same reasons stated in the previous section. The decision of the court of appeals is a final decision

as to the racially discriminatory aspects of the November 2, 1970 redistricting plan, although we contest defendants' frequently repeated contentions that the court of appeals decision foreclosed further inquiry into the racially discriminatory aspects of the subsequent revised plan. The court of appeals' decision was a final adjudication both on the question of malapportionment and on the question of racial discrimination. The order issued by the district court which was appealed to the court of appeals was a final order determining the rights of the parties for the 1971 primary and general elections in Adams County, Mississippi and the future rights of the plaintiffs with regard to their entitlement to a new plan which more nearly equalized the population as among the five districts.

The interests of all parties concerned, and indeed the interests of black voters and political bodies throughout the State of Mississippi, would best be served by prompt adjudication of the issues presented. As indicated above, these issues already have arisen a second time in this very case, and there are many cases currently pending in Mississippi raising these very same issues. The planning agent of the defendants, Comprehensive Planners, Inc., already has completed or is undertaking redistricting in 42 counties in the state, and many of the redistricting plans which have been completed in those counties raise the very same questions regarding dispersal of the black population, the burden of proof after use of a racial classification and a disproportionate burden on voting strength have been shown, etc., presented here.

D. SUMMARY

The issues presented in the instant Petition go to the heart of the electoral process and the duty of political subdivisions with a past history of racial discrimination to remedy that discrimination and the duty of Federal courts "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). This Court repeatedly has emphasized that apportionment schemes are unconstitutional when they "designedly or otherwise . . . operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143 (1971). Similarly, this Court has ordered strict scrutiny of apportionment schemes to determine whether the plan "was designed to favor particular groups," *Abate* v. *Mundt*, 403 U.S. 182, 186 (1971).

What is the meaning of the frequently used word "minimize," cited above? If it is feasible to redistrict a 50 percent black county in Mississippi to provide two black majority districts and still meet the criteria of population equality, compactness, and preserving historic boundary lines and neighborhood areas, doesn't a redistricting plan which provides only one black majority district "minimize" black voting strength?

Doesn't a redistricting plan which disperses concentrations of black population among areas of white population concentration, under the circumstances of ra-

cial bloc voting, "cancel out" the voting strength of racial elements, as the district courts in Louisiana repeatedly have held? See *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452, 457 (E.D. La. 1971), modified, ____F.2d____ (5th Cir. 1971), cert. filed sub nom. *Taylor* v. *McKeithen*, 40 U.S.L.W. 3356 (U.S. Dec. 13, 1971) (No. 71-784); *Troxler* v. *St. John the Baptist Parish Police Jury*, 331 F. Supp. 222 (E.D. La. 1971).

Doesn't a redistricting plan which consciously and intentionally has been drawn to protect the positions of white incumbents in a bi-racial county with a past history of voting discrimination "designedly . . . favor particular groups"? See *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), aff'd sub nom. *Ely* v. *Klahr*, 403 U.S. 108 (1971); *Bussie* v. *Governor of Louisiana*, supra; *League of Nebraska Municipalities* v. *Marsh*, 242 F. Supp. 357, 360 (D. Neb. 1965), appeal dismissed, 382 U.S. 1021 (1966).

This action was filed in reliance on the promise given by this Court in the cited cases, and petitioners urgently submit that the redistricting here at issue meets the criteria of invidious discrimination set out in those cases. If that promise is not fulfilled, and the criteria not given full recognition, then the newly enfranchised black voters of Mississippi will have every reason to become disillusioned with the political system held out as the means of fulfilling the goal of equality in America. If relief is not granted, the rights of black voters to full, equal, and effective participation in the political process — secured in the post-Civil War Constitutional Amendments and guaranteed in the Civil Rights Acts of 1957, 1960, 1964, and the Voting Rights

Act of 1965 — will merely become another promise unfulfilled and another dream deferred. Petitioners urge that the Petition be granted.

Respectfully submitted,

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